SUPREME COURT, U.S.
FILED
DEC - 7 2016
OFFICE OF THE CLERK

No. 16-466

IN THE

Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,

Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,

Respondent.

On Petition for a Writ of Certiorari to the California Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner is a drug manufacturer that sold a drug nationally with the assistance of a California distributor. Through those nationwide efforts, petitioner specifically sold massive amounts of the drug in California. Petitioner also has other substantial operations in California, including relating to the development of drugs.

California and non-California residents brought products liability claims in California state court arising from the national marketing and sale of the drug.

The California state courts indisputably have jurisdiction over the claims of *both* the California and non-resident plaintiffs. Petitioner admits that it is subject to specific personal jurisdiction with respect to the claims of California plaintiffs. The California courts also undoubtedly have jurisdiction over the claims of the *non*-resident plaintiffs against the California distributor.

The Question Presented is:

Whether in these circumstances the Constitution immunizes petitioner from the personal jurisdiction of the state courts with respect to the claims of non-resident plaintiffs arising from the identical factual allegations as those plaintiffs' claims against the in-state distributor and the resident plaintiffs' claims against petitioner itself.

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BRIEF IN OPPOSITION

Respondents respectfully request that the Petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE

1. Petitioner Bristol-Meyers Squibb (BMS) is a Delaware corporation with substantial operations in California, including five offices that perform research and development. Pet. App. 4a-5a. BMS also employs approximately 250 sales representatives in California, has a government advocacy office in Sacramento, has been registered with the California Secretary of State to conduct business in the State since 1936, and maintains a registered agent for service of process in the State. *Id.*

BMS manufactures, markets, and sells the anti-clotting drug Plavix throughout the United States using nationwide marketing campaigns. BMS specifically distributes Plavix nationally through agreements with McKesson Corporation, which has its principal place of business in San Francisco, California.

From 2006-2012, BMS marketed, distributed, and sold over 180 million Plavix pills to distributors and wholesalers in California alone, generating sales revenue of nearly $1 billion. *Id.*

2. Although BMS marketed Plavix as "providing greater cardiovascular benefits, while being safer and easier on a person's stomach than aspirin," *id.* at 3a, the actual reality was that the drug created a substantial risk of "heart attack, stroke, internal bleeding, blood disorder[s] or death," *id.* at 3a-4a. On that basis, residents of California and other states

sued both BMS and McKesson in California state court. *Id.* at 2a-4a.

Respondents all stated products liability claims resting on the conduct of BMS and McKesson in the design, development, manufacture, testing, marketing, labelling, and sale of Plavix. *Id.* All the complaints allege "the same" claims. *Id.* at 3a. The California resident plaintiffs do not allege any facts specific to acts in that state that distinguish their claims from those of the non-resident plaintiffs.

The actions were coordinated before the San Francisco Superior Court. *Id.* at 4a. California's long-arm statute grants the state courts personal jurisdiction to the full extent of the Due Process Clause of the Fourteenth Amendment. *Id.* at 6a.

In this case, it is undisputed that the California court will adjudicate the substance of the claims of both the resident and non-resident plaintiffs, and that BMS will be a party to all that litigation. That is so because the California courts have jurisdiction over claims brought by all the plaintiffs – *both* resident and non-resident. BMS itself concedes that it is subject to personal jurisdiction with respect to the residents' claims. Pet. App. 95a-96a n.2 (Cal. Ct. App. opinion). McKesson does not challenge jurisdiction with respect to either the resident or non-resident plaintiffs.

BMS did seek to dismiss the case in part, arguing that the court lacked jurisdiction to adjudicate BMS's own liability (as opposed to that of McKesson) to the non-residents (as opposed to the residents). In other words, although BMS acknowledges that it will participate in the litigation of these very claims by both the resident and non-resident plaintiffs, it argues

that the Constitution requires cleaving off one subset of its liability to one subset of the plaintiffs, who presumably would be required to relitigate all the same questions once again in their home states.

The Superior Court rejected that argument. *Id.* at 5a-6a (Cal. Sup. Ct. opinion). BMS petitioned the Court of Appeals for a writ of mandate, which the Court of Appeals summarily denied. *Id.* The Supreme Court of California remanded for consideration of this Court's intervening ruling governing general jurisdiction in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). The Court of Appeals again denied the writ. Pet. App. 6a.

The Supreme Court of California affirmed. *Id.* at 44a-45a. First, applying *Daimler*, it held that BMS was not subject to general jurisdiction in California. The court reasoned that general personal jurisdiction would only be found in those states in which BMS is "at home" – Delaware (where it is incorporated) or New York or New Jersey (where it has its principal place of business). *Id.* at 16a-19a.

The Court then concluded that "under the particular circumstances present here" the California courts have specific personal jurisdiction over BMS with respect to the non-resident plaintiffs' claims that arise from the identical facts as those of the resident plaintiffs. *Id.* at 20a-44a. The relevant legal test, it explained, is "well settled":

> The question of whether a court may exercise specific jurisdiction over a nonresident defendant involves examining (1) whether that defendant has "purposefully directed" its activities at the forum; (2) whether the

> plaintiff's claims arise out of or are related to these forum-directed activities; and (3) whether the exercise of jurisdiction is reasonable and does not offend "traditional notions of fair play and substantial justice."

Id. at 20a-21a (citations omitted).

Although BMS conceded the first and third factors, the Court addressed each. First, it found that "there is no question that BMS has purposefully availed itself of the privilege of conducting activities in California." *Id.* at 22a-25a. "Not only did BMS market and advertise Plavix in this state, it employs sales representatives in California, contracted with a California-based pharmaceutical distributor, operates research and laboratory facilities in this state, and even has an office in the state capital to lobby the state on the company's behalf." *Id.* at 24a-25a. "On the basis of these extensive contacts relating to the design, marketing, and distribution of Plavix, BMS would be on clear notice that it is subject to suit in California concerning such matters." *Id.* at 25a-35a.

Second, the Court found that the non-resident plaintiffs' claims were significantly related to BMS's contacts with California, "taking into account *all* of BMS's activities in this state and their relation to the causes of action at issue here." *Id.* at 25a-35a. The Court found it significant that BMS did not dispute that all the plaintiffs' claims – including those of the resident plaintiffs over which the California courts indisputably have jurisdiction – arose from the same conduct: BMS's "common nationwide course of distribution." *Id.* at 25a-29a. BMS thus had not "asserted that either the product itself or the

representations it made about the product differed from state to state." *Id.* at 28a. Further, and critically, "BMS does not contest that its marketing, promotion, and distribution of Plavix was nationwide and was associated with California-based sales representatives and *a California distributor, McKesson Corporation, which plaintiffs allege is jointly liable.*" *Id.* (emphasis added). Further, "BMS's research and development activity in California provides an additional connection between the nonresident plaintiffs' claims," which include the allegation that "BMS engaged in a course of conduct of negligent research and design that led to their injuries." *Id.* at 29a.

The Court distinguished the facts of this case from one in which the claims of resident and non-resident plaintiffs were merely "parallel." *Id.* at 29a. Although "BMS contends that the nonresident plaintiffs' contacts would be exactly the same if BMS had no contact whatsoever with California," the Court rejected that argument, explaining that it entirely "ignores the uncontested facts that *all* the plaintiffs' claims arise out of BMS's nationwide marketing and distribution of Plavix." *Id.* (emphasis added). Thus, the claims of both the resident and non-resident plaintiffs were not based on merely "similar" conduct, but the exact same singular and coordinated marketing and distribution scheme. *Id.* at 29a-30a.

Third, the Court explained that – as BMS itself conceded – the assertion of specific personal jurisdiction would "comport with traditional notions of fair play and substantial justice." *Id.* at 35a-44a (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). BMS inevitably must defend against the

parallel claims of California residents arising from the same operative facts, in a suit that moreover will adjudicate the claims of the non-residents against McKesson involving those same facts. Hearing all claims in one forum would not be more burdensome – indeed, would be substantially less burdensome – than hearing them in a "scattershot manner" in multiple states. *Id.* at 37a-38a.

The Court also explained that the California Civil Procedure Code provides for avenues for taking out-of-state depositions of key witnesses, such as treating physicians. *Id.* Further, the State has an interest in both regulating the conduct of McKesson *and* providing a forum for non-residents when information associated with their claims is intrinsically related to the claims of its residents. *Id.* at 38a-41a.

The dissenting justices recognized that BMS "contests neither the first prong" (purposeful availment) "nor the third" (reasonableness) of the specific personal jurisdiction analysis. *Id.* at 46a-86a (Werdegar, J., dissenting). But the dissent adopted a different characterization of the non-residents' claims. It viewed them as "merely parallel" to the residents' claims, *id.* at 56a, focusing on the fact that none of the non-resident plaintiffs purchased or ingested Plavix in California and that Plavix was not manufactured, developed, nor labelled in California. *Id.* at 46a-51a.

REASONS TO DENY THE WRIT

I. The Ruling Below Does Not Implicate Any Conflict In The Lower Courts.

At a high level of generality, petitioner alleges a conflict in the lower courts over the standard for determining specific personal jurisdiction. Although that claim is substantially overstated, it is also irrelevant. Petitioner identifies no ruling from any court rejecting the assertion of jurisdiction on similar facts, much less a clear conflict requiring this Court's intervention. The holding below instead turns on – and is by its terms limited to – the fact that the non-resident claims against petitioner in fact are substantially related to California in several respects, and that petitioner inevitably will litigate the same allegations in a California court that will also adjudicate the parallel claims of the non-resident plaintiffs against a California entity.

Rather than adopting any sort of categorical rule, the majority below was clear that "the minimum contacts test is applied on a case-by-case basis, focusing on the nature and quality of the defendant's activities in the state." *Id.* at 35a (majority opinion). That is entirely appropriate. This Court has explained that with respect to personal jurisdiction "few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable." *Kulko v. Super. Ct.*, 436 U.S. 84, 92 (1978). The "minimum contacts" analysis "is not susceptible of mechanical application." *Id.*; *see also Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298, 307 (1992) (describing the personal jurisdiction analysis as a "flexible approach").

Petitioner claims that courts have rejected specific personal jurisdiction in two analogous cases – just two. The *more recent* one was decided *thirty-two years ago*. The very fact that petitioner's authority is so thin is evidence enough that certiorari is not warranted. There also has been significant water under the bridge with respect to specific personal jurisdiction in the intervening decades, so there is reason to doubt whether those rulings even remain good law. *See, e.g.*, Pet. xii-xv (citing eight jurisdictional rulings of this Court from 1984 or later). But in any event, both of those appellate decisions are easily distinguishable for exactly the reasons given by the California Supreme Court.

In *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745 (4th Cir. 1971), three individual plaintiffs – all non-residents – brought products liability claims in South Carolina against two non-resident drug companies that did not even have an office in the state. The plaintiffs sued there as a legal strategy to expand the defendants liability, because South Carolina was the only relevant state in which the statute of limitations had not run. They asserted that the state court had personal jurisdiction merely because the drug company sold the drug in the state. The court rejected that argument without difficulty: "When, however, defendant's only activities consist of advertising and employing salesmen to solicit orders, we think fairness will not permit a state to assume jurisdiction." *Id.* at 748. But the court recognized that jurisdiction would be appropriate if the "other contacts between the corporation and the state" were "*fairly extensive*." *Id.* (internal quotation marks omitted).

In *Glater v. Eli Lilly & Co.*, 744 F.2d 213 (1st Cir. 1984), a single non-resident plaintiff brought suit in New Hampshire against a non-resident drug company, which did not even sell drugs directly in the state. The plaintiff asserted that jurisdiction existed solely because of certain indirect sales into New Hampshire. As the court explained, that was merely the assertion that every "nonresident injured out of state by a drug sold and consumed out of state[] could bring suit in New Hampshire." *Id.* at 216 n.4. The court summarily rejected that argument, explaining that "[w]e do not think that Lilly's sales of DES in New Hampshire can be said to be related to Glater's injury." *Id.* at 216.

Neither the 1971 decision in *Ratliff* nor the 1984 ruling in *Glater* has any – much less all – of the features that the California Supreme Court deemed essential to finding specific personal jurisdiction in this case. *Ratliff* in fact holds that jurisdiction would be appropriate if the drug company's ties to the state were "*fairly extensive*." The manufacturer in *Glater* made no sales in the forum state, instead selling to distributors who themselves would sell within New Hampshire. *Glater*, 744 F.2d at 214-15. The manufacturers in *Ratliff* lacked any offices in the state or warehouses to store goods in the state; they had no personal property or bank accounts in the state; and only one defendant had "detail men" in the state. 444 F.2d at 748. At best, the only contacts between the state and the defendants were some direct-to-doctor advertisements and the presence of a few salesmen in the state. *Id.* at 746.

Here, it is undisputed that in this very litigation in which BMS will be a party the state court is

properly adjudicating both (i) claims against BMS arising from the same factual allegations, and (ii) claims involving those same events brought by the non-resident plaintiffs against McKesson. So any claim that BMS will be unduly burdened by litigating in California rings hollow. Even more important, the same marketing and distribution activities that give rise to the residents' claims against BMS also give rise to the non-residents' claims.

Further, in this case, the non-resident plaintiffs' claims *directly* involve BMS's nationwide marketing activities with McKesson, a California corporation. BMS also has substantial research and development facilities in California, which the state court concluded were relevant to the non-resident plaintiffs' claims regarding BMS's practices in developing drugs.

The California Supreme Court specifically distinguished *Glater* on that basis and made clear that it would have found jurisdiction lacking on the facts of that very different case. Petitioner states that the California court merely reasoned that "the First Circuit does not apply a 'sliding scale approach to specific jurisdiction.'" Pet. 18. That is not true. The Court actually reasoned: "Although the facts of *Glater* [] also involve the sales and marketing of an allegedly defective drug, the pharmaceutical company's contacts with the forum state, New Hampshire, appear to have been far less substantial than BMS's contacts to California." Pet. App. 31a.

More broadly, petitioner urges this Court to grant review based on a supposed generalized conflict over whether specific personal jurisdiction is evaluated on the basis of a "sliding scale." But this case is not a

vehicle to resolve any such conflict. At the very least, there is no indication whether the resolution of that supposed disagreement would affect the outcome of this case. Here, it is an academic question. No court applying any standard has rejected the assertion of specific personal jurisdiction in circumstances comparable to these.

Petitioner also omits that California has applied its rule for decades, and this Court has declined multiple requests to review those rulings. Those cases were far superior vehicles to decide the question presented, because neither involved contacts with the forum state that were nearly as extensive. *See, e.g.*, *Harrah's Las Vegas, Inc. v. Snowney*, 546 U.S. 1015 (2005) (single plaintiff suit against nonresident defendants); *Wash. Rest. Mgmt. v. Vons. Co., Inc.*, 522 U.S. 808 (1997) (same). This Court has also declined to review the rulings of other Circuits and states that apply the California approach to the relatedness inquiry. *See, e.g.*, *Avocent Huntsville Corp. v. Aten Int'l Co.*, 557 U.S. 904 (2009) (denying certiorari from decision of Federal Circuit declining to find personal jurisdiction for declaratory judgment action based on threat of enforcement of patent); *Shoppers Food Warehouse MD Corp. v. Moreno*, 530 U.S. 1270 (2000) (denying certiorari from decision of D.C. Court of Appeals on rehearing en banc, over two dissenting opinions, finding personal jurisdiction due to non-resident defendant's extensive advertising activity in the District); *Domtar, Inc. v. Niagara Fire Ins. Co.*, 516 U.S. 1017 (1995) (denying certiorari from decision of Minnesota Supreme Court finding personal jurisdiction for declaratory judgment action brought by non-resident insured against Canadian insurer to

determine coverage of policy); *cf. Chew v. Dietrich*, 525 U.S. 948 (1998) (denying certiorari from decision of Second Circuit, who in applying their relatedness test, explained that "[w]here the defendant's contacts with the jurisdiction that relate to the cause of action are more substantial, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury," *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998)).

Petitioner nonetheless argues that – although it cannot identify any analogous cases – jurisdiction would necessarily be denied in courts requiring that a defendant's forum state contacts "in some way *caused* the plaintiff's injury," Pet. 9-10, including because those activities must be a "but for" cause of the injury, *id.* 11-12. This case supposedly implicates that rule because petitioner represents – time and again – that the California Supreme Court "did not dispute that respondents' 'claims would be exactly the same if [Bristol-Myers] had no contact whatsoever with California.'" Pet. 3; *see also id.* 12, 17, 33. That characterization of the opinion is inexplicable. The sentence petitioner quotes actually just restates petitioner's own argument. Petitioner omits that the sentence actually begins: "BMS contends . . . ." Pet. App. 29a. Then the opinion's next sentence expressly (and correctly) rejects BMS's contention: "This characterization ignores the uncontested fact that all the plaintiffs' claims arise out of BMS's nationwide marketing and distribution of Plavix." *Id.* The Court thus recognizes that an essential element of BMS's contacts with California was the nationwide

marketing and distribution of Plavix that give rise to the claims of both the residents and non-residents. *Id.*

Even if that were not so, there would be no conflict between the ruling below and the decisions cited by petitioner. As discussed, the Supreme Court of California identified and relied upon two other substantial contacts between BMS and the State that are directly involved in the case. BMS distributed Plavix to non-residents through McKesson, a California company. And BMS's research and development activities in California were related to the claims of the non-residents of flaws in BMS's drug development practices.

By contrast, the cases cited by petitioner as embodying the supposed circuit conflict, Pet. 11-16, arise from a common – and easily distinguished – fact pattern. They involve individual non-resident plaintiffs suing a non-resident defendant with little to no relevant contact with the forum. None involve comparable contacts to this case.

Just as important, none involve many plaintiffs, both resident and non-resident, in a mass action arising from identical facts. Mass actions are fundamentally different from traditional litigation, raising distinct questions about fairness to the litigants and to the states themselves. This is particularly true of mass actions where – as in this case – the non-resident defendant is indisputably subject to the personal jurisdiction of the forum's courts for some plaintiffs; all the plaintiffs bring essential identical claims; and the non-resident defendant will inevitably be a party to the litigation of the claims of the non-residents. In such a case, there

is no inherent unfairness to the non-resident defendant, and the nation's judicial systems operate far more efficiently by adjudicating the indistinguishable claims together. The concerns raised by a mass action such as this are *exactly* why this Court has eschewed a formulaic approach to the inherently flexible Due Process analysis associated with personal jurisdiction.

II. The Ruling Below Does Not Conflict With This Court's Precedents.

There is no merit to BMS's argument that the ruling below conflicts with this Court's rulings. In BMS's view, specific personal jurisdiction exists only if the defendant's in-state activities give rise to the plaintiff's claims. That is not correct. In *Helicopteros Nacionales de Col., S.A. v. Hall*, 466 U.S. 408 (1984), and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), this Court concluded that the plaintiff's claim must *either* "arise out of *or* relate to," the defendant's contacts with the forum. *Burger King*, 471 U.S. at 472 (emphasis added) (internal quotation marks omitted).

BMS focuses on *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011). Pet. 20-21. But *Goodyear* involves general jurisdiction, not specific jurisdiction. The relevant legal standards are of course entirely different. *Goodyear* mentioned specific jurisdiction in passing dictum, restating the traditional test that specific jurisdiction "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." 564 U.S. at 919 (internal quotation marks omitted). There is no conflict between that rule and the decision below.

Nor is there tension – much less conflict – between the ruling below and *Walden v. Fiore*, 134 S. Ct. 1115 (2014), which reiterated that the "[w]ell-established principle[]" that the "defendant's suit-related conduct must create a substantial connection with the forum State." *Id.* at 1121. For the reasons given by the Supreme Court of California and discussed above, that standard is satisfied here.

BMS's only answer is to claim that the Court sweepingly held that specific personal jurisdiction exists whenever a defendant has "a national marketing strategy." Pet. 23. That caricature bears no resemblance to the ruling below. In fact, BMS's national marketing and distribution are relevant only because they form the identical basis for the claims of both the resident and non-resident plaintiffs. But there is much more in this case, and the ruling below makes clear those additional facts are essential. Among other things, BMS distributed the drug to the non-residents under agreements with a California distributor and BMS's operations in California are directly relevant to the non-residents' claims. Further still, BMS is inevitably participating in the litigation of these claims in the California court by the resident plaintiffs.

Those facts also explain why BMS errs in arguing that the ruling below nullifies this Court's holding in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). *Daimler*, like *Goodyear*, involves general jurisdiction. The California Supreme Court expressly applied *Daimler* to hold that general jurisdiction is lacking against BMS. The Court then explained why its specific jurisdiction ruling did not open the door to

sweeping assertions of jurisdiction against corporations that operate nationally:

> BMS's argument overstates the effect of our conclusion that specific jurisdiction is properly exercised here. Our decision does not render California an all-purpose forum for filing suit against BMS for *any* matter, regardless of whether the action is related to its forum activities. We simply hold under this specific set of circumstances that, for purposes of establishing the requisite minimum contacts, plaintiffs' claims concerning the allegedly defective design and marketing of Plavix bear a substantial nexus with or connection to BMS's extensive contacts with California as part of Plavix's nationwide marketing, its sales of Plavix in this state, and its maintenance of research and development facilities here so as to permit specific jurisdiction.

Pet. App. 35a.

Of note, in response to a comment by Justice Sotomayor in her concurrence, the *Daimler* majority noted "the many decades in which specific jurisdiction has flourished" and explained that specific jurisdiction continued to exist to prevent any "deep injustice[s]" created by the Court's narrowing of general personal jurisdiction. 134 S. Ct at 758 n.10. The *Goodyear* Court only mentioned specific jurisdiction in passing, restating the traditional test that specific jurisdiction "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes

jurisdiction." 564 U.S. at 919 (internal quotation marks omitted).

There accordingly is no conflict between the ruling below and this Court's precedents.

III. This Case Is A Poor Vehicle In Which To Decide The Question Presented.

Contrary to petitioner's submission, assuming that the question presented ever warrants review, this case would be a poor vehicle to decide it. Although this Court has granted certiorari in a case involving the "relatedness" inquiry for specific personal jurisdiction, this is a very different case. As discussed, here there are significant links between petitioner's activities in the forum and the non-resident plaintiffs' claims.

To the extent this question requires resolution—and it does not—a much better vehicle would be for the Court to grant certiorari for a case where the outcome-determinative issue was a choice between but for and proximate causation. Such a case would allow the Court to both determine if causation is a required element of the relatedness inquiry and then, if necessary, resolve *which* causation test is proper. Thus, the Court should wait until presented with a situation where the choice of a but for or proximate causation test is itself dispositive. Indeed, that is *exactly* what the Court did in granting certiorari in *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), where the Ninth Circuit's use of the proximate causation test over the but for test was outcome determinative. *Compare id.* at 383 ("Were this court to apply the [proximate causation] 'arising from' analysis . . . to this case, we would conclude that Mrs. Shute's

fall did not arise out Carnival's solicitation of business in Washington."), *with id.* at 385-86 ("Applying the [but for] standard, we conclude that the Shutes' cause of action arose out of Carnival's contacts with Washington."). Although the Court unsurprisingly passed on resolving the relatedness inquiry and reversed the Ninth Circuit on alternative grounds, that case presents the paradigmatic structure for a proper vehicle to resolve this dispute. If the Court felt the need to speak on this issue, it should wait for a case more similar to *Shute*. And, as the amici explain, the Court should not have to wait long for such a case considering the frequency at which specific personal jurisdiction is adjudicated by the courts.

For similar reasons, this case involves much more complicated considerations with far greater implications for class action litigation. If petitioner's argument were accepted, it is difficult to see how many nationwide mass and class actions could proceed on the basis of specific personal jurisdiction. In petitioner's view, in the great majority of cases, no court in which the defendant is not subject to general jurisdiction could adjudicate the claims of plaintiffs from multiple states. That is not the accepted rule in any jurisdiction of which we are aware. It has the potential to radically transform American class action litigation. Before this Court undertakes such a question, the issue should be permitted to percolate to a substantially greater extent in the lower courts, which thus far have not considered it.

This case is also a poor vehicle to decide the question presented because of BMS's unusual choices in litigating it below. BMS conceded the third prong of the specific personal jurisdiction inquiry. Pet. App.

138a-39a (Cal. Ct. App. Opinion). Once the plaintiff has established minimum contacts under the purposeful availment and relatedness prongs, the defendant can show that assertion of personal jurisdiction would not be reasonable and would offend "traditional notions of fair play and substantial justice." *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 (1987) (internal citation omitted). In determining whether assertion of jurisdiction is reasonable, the court considers "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief," along with "the interest judicial system's interest in obtaining the most efficient resolution of the controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies." *Id.* These are, in essence, considerations of fairness to the defendant. This step is the proper time for the court to balance factors such as the effect of asserting jurisdiction on business development within the state or evidentiary difficulties facing the defendant, such as obtaining the testimony of non-forum witnesses or experts.

BMS, however, did not contest that assertion of jurisdiction would be unreasonable, instead entirely focusing its argument on the relatedness prong. Pet. 9-33. In this case, this Court would accordingly be substantially hamstrung in resolving the issue because of petitioner's concession. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 (1980) (noting that "reasonableness" is central to the due process analysis). Indeed, the Petition *expressly* limits the question presented to the "relatedness" inquiry, rather than the general question of whether the assertion of

specific personal jurisdiction comports with Due Process. Pet. i.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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December 7, 2016